UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

In re: RICHARD LEE MATTHEWS	)	Case No. 05-60876
	)	
Debtor,	)	
	)	
REBECCA F. FLOYD,	)	Adv. No. 05-06046A
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RICHARD LEE MATHEWS,	)	
	)	
Defendant,	)	
	)	

MEMORANDUM

This matter comes before the court by way of a complaint filed by Rebecca F. Lloyd, ("the Plaintiff") against Richard Lee Matthews ("the Defendant") seeking a declaration that certain debts owed to her by the defendant are non-dischargeable under 11 U.S.C. § 523(a)(5). This Court has jurisdiction over this matter. 28 U.S.C. § 1334(a) & 157(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) & (I). Accordingly, this court may render a final judgment.

After a trial was held, a briefing schedule was set. The parties have filed briefs and the matter is ready for consideration.

Facts

In 1998, the Defendant filed a chapter 7 petition.[1] Shortly thereafter, he met the Plaintiff. They married on April 3,1999[2]. The marriage produced no children[3]. When the parties married, the Plaintiff owned a house that secured a consensual lien in the approximate amount of $48,000.00.[4] The Plaintiff asserts that during the marriage, the parties remortgaged the home for an additional $105,000.00 and incurred approximately $35,000.00 in credit card debt.[5] The Defendant admits that they accumulated "a substantial amount of debt"[6]. Because the Defendant had previously filed a bankruptcy petition, the debt was incurred in the Plaintiff's name.

On August 25, 2003, the parties entered into a separation agreement ("the Separation Agreement") which provided in relevant part:

> In consideration for the [Plaintiff] assuming all of the family debt as listed below and after considering the relative values of the respective retirement plans and automobiles[,] the [Defendant] agrees to pay the [Plaintiff] $50,000.00, $5,700.00 of which has been paid with the balance to be paid in three (3) equal installments of $14,766.66 payable February 1, 2004, August 1, 2004 and January 1, 2005. The [Defendant] agrees to execute a promissory note in the amount of $44,300.00 . . .
>
> . . . This payment is in lieu of spousal support and the debt shall not be dischargeable in bankruptcy[7]. The payment shall not be deducted by the [Defendant] and not taxable to

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1 Plaintiff's testimony, transcript of hearing, page 7, line, 12 to page 9, line 8.

2 Divorce Decree, Page 1.

3 Id.

4 Defendant's testimony, transcript of hearing, page 23, lines 4-6.

5 Plaintiff's testimony, transcript of hearing, page 23, lines 9-18.

6 Plaintiff's testimony, transcript of hearing, page 10, lines 13-19.

7 There is a separate section in the Separation Agreement that also provides that all debts arising under it are intended by the parties to be non-dischargeable. Any such provision is void. Pre-petition waivers of discharge are unenforceable as against public policy. See e.g., Hayhoe v. Cole (In re Cole), 226 B.R. 647 (9th Cir. B.A.P. 1998) (cited with approval by the court in Airlines Reporting Corporation v. Mascoll (In re Mascoll), 246

> the [Plaintiff]. The [Defendant] recognizes that the real estate where the family resided which is in the name of the [Plaintiff] is her sole, separate property and that in calculating his obligations for the family debt and his share of the indebtedness he has received credit for the original indebtedness on the real estate at this time of their marriage. The [Defendant] further recognizes that all of the tangible personal property in the family residence belonged to the [Plaintiff] at the time of the marriage and is her sole separate property.

The $50,000.00 obligation arising under this section of the Separation Agreement is referred to herein as "the Separation Obligation."

On March 25, 2004, a Divorce Decree was entered by the Circuit Court for Amherst County, Virginia, legally terminating the parties' marriage. The Divorce Decree incorporated the Separation Agreement into its terms.

On March 9, 2005, the Defendant filed a chapter 7 petition. On June 20, 2005, the Plaintiff filed the instant complaint. On August 2, 2005, the Defendant filed an answer.

Discussion

The sole issue is whether the Separation Obligation is properly characterized as alimony, maintenance or support as that term appears in 11 U.S.C. § 523(a)(5). Section 523(a)(5) provides that:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
> . . .
> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that–
> . . .
> (B) such debt includes a liability designated as alimony, maintenance, or

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B.R. 697, 706-707 (Bankr. D.D.C. 2000)).

> support, unless such liability is actually in the nature of alimony, maintenance, or support;

The burden of coming forward with evidence is on the plaintiff. Beaton v. Zerbe (In re Zerbe), 161 B.R. 939, 940 (Bankr. E.D.Va. 1994) ("Since discharge is favored by the Code, the party to whom the debt is owed has the burden of proof to demonstrate that the debt is non-dischargeable under § 523." (Quoting Tilley v. Jessee, 789 F.2d 1074, 1077 (4th Cir.1986))). She must prove her case by a preponderance of the evidence. Cf. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 2d 755 (1991). (Holding that a plaintiff must prove the elements under 11 U.S.C. § 523(a)(6) by a preponderance of the evidence.)

The determination whether an obligation is in the nature of alimony, support or maintenance is one of federal bankruptcy law, not state law. In re Long, 794 F.2d 928 (4th Cir. S.C. 1986). Also see 4 Collier on Bankruptcy, "Exceptions to Discharge", ¶ 523.04, p. 523-19 (15th ed. rev.). Although state law is not dispositive, it may provide some guidance to the bankruptcy court in its determination. See Forsdick v. Turgeon, 812 F.2de 801 (2nd Cir. 1987) and In re Spong, 661 F.2d 6 (2nd Cir. 1981).

Under federal law, an award in a separation agreement constitutes alimony, maintenance, or support if the parties intended it to be such at the time the agreement was executed. Melichar v. Ost (In re Melichar), 661 F.2d 300, 303 (4th Cir. 1981)[8]. Also see Beaton v. Zerbe (In re Zerbe), 161 B.R. 939, 940 (Bankr. E.D.Va. 1994) (The issue of whether a debt is in the nature of alimony, maintenance, or support is largely a question of the intent of the parties.)

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[8] While the opinion in Melichar issued under the Bankruptcy Act of 1898, much of the judicial law promulgated prior to the enactment of the Bankruptcy Code of 1978 is applicable today. See Hamlett v. Amsouth Bank (In re Hamlett), 2003 WL 756268 C.A.4 (Va.) 2003. (Noting that Long v. Bullard, 177 U.S. 617 (1886) retains its vitality under the 1978 Bankruptcy Code.)

Federal courts consider the following factors in determining whether a debt is alimony, maintenance or support: (1) labels used in the separation agreement; (2) the income and needs of the parties at the time that the obligation became fixed; (3) the amount and outcome of property division; (4) whether the obligation terminates on the death or remarriage of the plaintiff; (5) the number and frequency of payments; (6) whether the plaintiff has waived alimony or support rights in the agreement; (7) whether the state court retains the right to modify the obligation or enforce it through contempt remedy; and (8) how the obligation is treated for tax purposes. 4 Collier on Bankruptcy, "Exceptions to Discharge", ¶ 523.04, p. 523-19 (15th ed. rev.) (And cases cited therein.) As with any totality-of-the-circumstances test, the analysis does not consist of an accounting, rather, each factor is considered in light of its weight and relevance. Each factor is to be weighed and considered in light of the other factors. A factor that is determinative in one case may be irrelevant in another case.

The first factor requires an examination of the labels used in the Separation Agreement. Although the court in Melichar held that "the true intent of the parties rather than the labels attached to an agreement or the application of state law controlled, [the Fourth Circuit Court of Appeals] did not thereby preclude an examination of a written agreement as persuasive evidence of intent." Tilley, 789 F.2d at 1077. In Tilley, the Court held that the use of separately designated segments in the separation agreement for alimony and for property settlement was strong evidence that the latter was not intended by the parties to be alimony.

In the case at bar, the first paragraph of the Separation Agreement, which provides for the division of property and the creation of the Separation Obligation, is not labeled. Nor is there any label given to the Separation Obligation in that section. The section does, however, provide

that the Separation Obligation "is in lieu of spousal support . . ." The term "in lieu of" means "instead of; in place of; in substitution of." Black's Law Dictionary, p. 708, (1979 Fifth Edition). The implication is that the parties intended the Separation Obligation to be something other than alimony. See Allison v. Allison, 51 N.C. app 622, 628-629, 277 S.E.2d 551, 555 (1981) (Interpreting the phrase "in lieu of all claims for alimony" to mean that the subject payment did not constitute alimony, but rather meant something that was substituted in its place.) Also see Knott v. Knott, 146 Md.App 232, 806 A.2d 768 (2002) (Affirming the interpretation of the master and the trial judge that "in lieu of child support" means not child support at all.) And see Edmundson v. Edmundson, 222 N.C. 181, 22 S.E.2d 576 (1942) ("'In lieu of alimony'" means in place of alimony, instead of alimony, and, in *totidem verbis*, excludes alimony.")

The designation of the Separation Obligation as "in lieu of spousal support" is strong, if not conclusive, evidence that the parties intended that the Separation Obligation be part of a property settlement, and not in the nature of alimony, maintenance or support.

The second factor, the income and needs of the parties at the time that the obligation became fixed, is perhaps the most important factor to be considered. 4 Collier on Bankruptcy, "Exceptions to Discharge", ¶ 523.11[6][b], p. 523-84 (15th ed. rev.) If the obligee spouse would have had difficulty in providing for herself, it is likely that the obligation will be determined to be in the nature of alimony, maintenance or support regardless of how the obligation is labeled. Id. (Citing Yeates v. Yeates (In re Yeates), 807 F.2d 874 (10th Cir. 1986) and Shaver v. Shaver, 736 F.2d 1314 (9th Cir. 1984).

In 2003, the Defendant earned $21,832.00, as indicated on his federal tax return.[9] The

[9] Defendant's testimony, transcript of hearing, page 40, line 24 to page 41, line 1.

Plaintiff earned $26,500.00 in 2003, taking home about $1,700.00 per month.[10] Her Mortgage payment was $1,140.00 per month.[11] Based on the relative wealth and income of the parties, it is concluded that this is not a case in which the post-separation support of one spouse was dependent on the other spouse.

The third factor concerns the amount and outcome of property division. Under the Separation Agreement, the Plaintiff kept the house and the furnishings, and most of the other marital property, with the exception of one vehicle.[12] During the marriage, the parties purchased an above-ground swimming pool costing approximately $4,500.00, a deck costing approximately $4,000.00, a paved driveway costing about $5,000.00, a shed costing about $900.00, a riding lawn mower costing about $1,300.00, and some less costly items for the house.[13] Some significant assets purchased by the parties during the marriage survived the marriage and were awarded to the Plaintiff, but she was burdened by the legal obligation to pay the vast majority of the marital debts.[14] This factor tends to indicate that the Separation Obligation constituted part of a property settlement, and was not alimony.

The fourth factor concerns whether the obligation terminates on the death or remarriage of the plaintiff. The Separation Agreement is silent on this issue.

The fifth factor requires the Court to consider number and frequency of payments.

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[10] Plaintiff's testimony, transcript of hearing, page24, lines 2-7.

[11] Plaintiff's testimony, transcript of hearing, page 23, lines 8-12.

[12] Plaintiff's testimony, transcript of hearing, page 32, lines 2-6.

[13] Plaintiff's testimony, transcript of hearing, page 29, line 6 to page 30, line 23.

[14] After the parties separated, the Plaintiff sold her house. She also borrowed money to pay off her debts, using land owned by her father as collateral. At the time of the trial she owed about $31,000.00. See Plaintiff's testimony, transcript of hearing, page 25, line 18 to page 27, line 7.

Alimony payments are traditionally made each month over an extended period of time of years or even decades. In this case, the number of payments, three, and the short term of the payments, sixteen months, indicate that the parties did not intend the Separation Obligation to be alimony.

The sixth factor, whether the plaintiff has waived alimony or support rights in the agreement, weighs in favor of the Defendant. In accepting the promise to pay the Debt in lieu of alimony, the Plaintiff effectively waived any right to alimony.

The seventh factor counsels the bankruptcy court to examine whether the state court retains the right to modify the obligation or enforce it through contempt remedy. The Separation Agreement provides that the "parties will not under any circumstances ask a Court to enter any decree or order which is inconsistent with the terms of this Agreement, unless by mutual written agreement." This provision indicates that the parties did not intend that either of them would have the right to seek a modification of the Separation Agreement. As such this provision in the Separation Agreement indicates that the parties did not intend that the Debt be in the nature of alimony, maintenance or support.

The eighth factor concerns the manner in which the Debt is to be treated for tax purposes under the Separation Agreement. The Separation Agreement provides that the Separation Obligation "shall not be deducted by the husband and [is] not taxable to the wife." Where a spouse deducts a payment under a separation agreement from his or taxable income, courts will construe the payment to be in the nature of alimony, maintenance or support. See Robb-Fulton v. Robb (In re Robb), 23 F.3d 895 (4th Cir. 1994) (Where a debtor classifies monthly payments as alimony for tax purposes, quasi-estoppel precludes him from avoiding the corresponding obligations or effects of this classification under the Bankruptcy Code.) It follows that it is an

indication that parties to a separation agreement do not intend a payment to be alimony when they specifically agree that the payment will be non-deductible by the payor spouse.

In addition to the factors listed above, the court may look to the testimony of the parties to determine their intent at the time that the Separation Agreement was executed. In Tilley, the Fourth Circuit Court of Appeals found it relevant that the non-debtor spouse testified that it was her intent that the debt in question be treated as alimony, but did not testify that the debtor spouse shared her intent. See Tilley, 789 F.2d. At 1078. In this case, the Plaintiff testified that the purpose of the Separation Obligation was to pay the debt arising from the use of credit cards during the pendency of the marriage and that the parties had discussed that fact.[15]

The Defendant testified that the parties did not contemplate that he would make the payments under the Separation Obligation. He testified that "[t]he personal agreement between me and her was to make small monthly payments the best I could until I got back on my feet, because I was starting all over again on my own."[16] He also testified that he did not know where he was going to get the money to pay the $44,300.00.[17]

The parties established the Separation Obligation so that the Plaintiff could pay off the credit card debt in her name. Such an obligation is in the nature of a property settlement and not alimony, maintenance or support.

Conclusion

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[15] Plaintiff's testimony, transcript of hearing, page 24, line 22 to page 25, line3. .

[16] Plaintiff's testimony, transcript of hearing, page 15, lines 19-22.

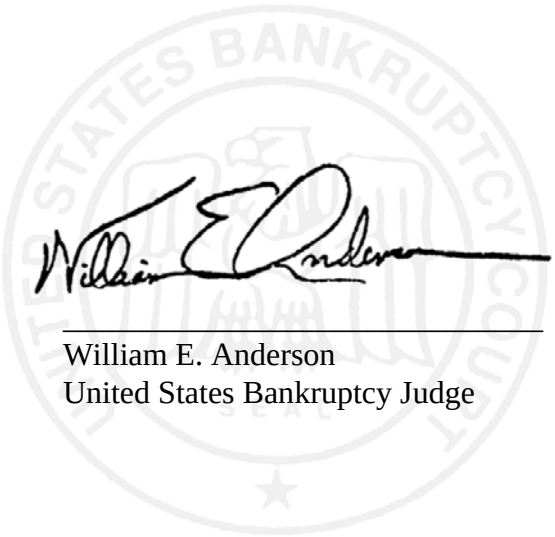
[17] Defendant's testimony, transcript of hearing, page 39, line15-19. The Defendant further testified that, the separation agreement notwithstanding, he and the Plaintiff made an agreement that he would help as much as he could, but that she understood that he was beginning his life anew and would not be able to help her very much.

The intent of the parties at the time of the separation determines whether a debt arising under a separation agreement is alimony, maintenance or support. The designation of the Separation Obligation as being in lieu of spousal support, the relative incomes and wealth of the parties, the fact that any payment of the Separation Obligation would not be deductible by the Defendant or taxable to the Plaintiff, the number and duration of the payments, and the testimony of the parties that the Separation Obligation was intended to be an offset to the Plaintiff for her obligation to pay credit card debt, all counsel this court to hold that the parties intended that the Separation Obligation constitute a part of a property settlement and not alimony, maintenance or support. As such, the subject debt is dischargeable

An appropriate judgment shall issue.

Upon entry of this Memorandum the Clerk shall forward copies to Stephen E. Dunn, Esq., counsel for the Plaintiff and Robert R. Feagans, Jr. Esq. counsel for the Defendant.

Entered on this _23_ day of March, 2006.



William E. Anderson
United States Bankruptcy Judge

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WESTERN DISTRICT OF VIRGINIA

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In re: RICHARD LEE MATTHEWS	)	Case No. 05-60876
	)	
Debtor,	)	
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REBECCA F. FLOYD,	)	Adv. No. 05-06046A
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
RICHARD LEE MATHEWS,	)	
	)	
Defendant,	)	
	)	

JUDGMENT

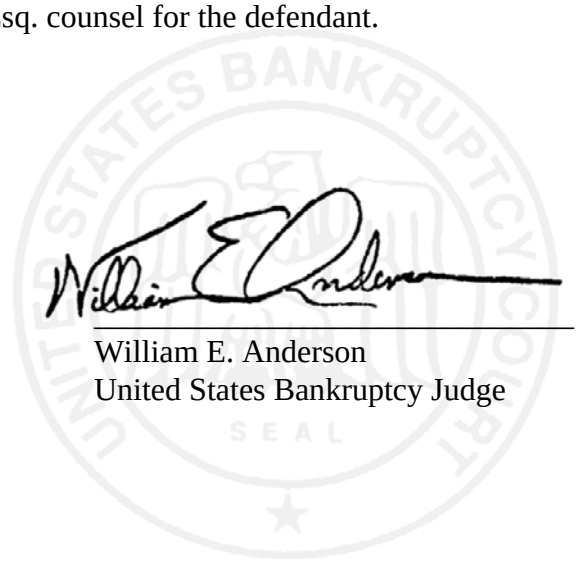
For the reasons stated in the accompanying memorandum,

It is ORDERED, ADJUDGED and DECREED that Judgment shall be and hereby is

entered in favor of the defendant Richard Lee Mathews and against the plaintiff Rebecca F. Floyd. The balance of the $50,000.00 obligation owed by the defendant to the plaintiff under the Separation Agreement dated August 25, 2003, shall be and hereby is declared discharged by the discharge order entered in the defendant's bankruptcy case no. 05-60876.

Upon entry of this Judgment the Clerk shall forward copies to Stephen E. Dunn, Esq., counsel for the plaintiff and Robert R. Feagans, Jr. Esq. counsel for the defendant.

Entered on this _23_ day of March, 2006.



William E. Anderson
United States Bankruptcy Judge